IN THE

Springfield Court of Appeals

OCTOBER TERM, 1922.

(POPLAR BLUFF CALL.)

ROY STROUD,

RESPONDENT,

VS.

MISSOURI PACIFIC RAILROAD COMPANY, A CORPORATION,

APPELLANT.

NO. 3245.

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT.

STATEMENT.

This cause of action originated in the Circuit Court of Ripley County, Missouri, and is brought under Section 9985 of the Revised Statutes of Missouri of 1919. The petition of the plaintiff alleges in substance, that respondent had on the 12th day of June, 1920, a quantity of lumber, to-wit, 20,000 feet, placed at Oxly, Missouri, a station on appellant's railroad, which he tendered for shipment, and

on that date made application for two cars in which to ship said lumber. The petition further alleges that after respondent had made application for the cars aforesaid, other shippers, shipping lumber from the same station, made application for cars, and these subsequent orders were filled before that of respondent.

The petition further alleges that by reason of the preference shown other shippers, respondent did not receive any cars until the 19th of August, 1920, and that by reason of such preference respondent was damaged in the sum of $1,000.00, occasioned by a considerable decline in the lumber market between the dates of June 12th, and August 19th, 1920.

The answer of appellant admits its corporate existence, and admits that respondent had a quantity of lumber placed for shipment at Oxly, Missouri, but denies that there was 20,000 feet of same, and denies that plaintiff tendered the lumber for shipment under the terms and conditions imposed by appellant, and further denies that plaintiff offered to pay defendant the customary charges for the transportation thereof.

The answer further alleges that the order for the two cars made June 12, 1920, by respondent, was filled by placing said cars ready for loading, but that respondent refused to load the cars for a period of four days, and then voluntarily permitted one A. M. Rash to load said cars and ship same. The answer denies any discrimination whatsoever.

For a further defense, appellant states in its answer that it operates two lines of railroad from Oxly, Missouri, to St. Louis, Missouri, one of which is wholly within Missouri, and the other crossing the Mississippi River at Thebes, Illinois, and going

up to St. Louis on the Illinois side of the river. Appellant further states in its answer that the usual way of routing lumber from Oxly, Missouri, to St. Louis, Missouri, would be via Thebes, Illinois, making the shipment an interstate shipment, and that Section 9985 of the Revised Statutes of Missouri of 1919 does not apply.

The evidence in the case on the part of the respondent tended to show that he placed at Oxly, Missouri, on June 12, 1920, 31,000 feet of lumber, that said lumber was stacked along the Missouri Pacific tracks at the place designated by the Railroad Company. Respondent testified that he was selling this lumber for $60.00 per M, and had a contract with A. L. Arnold, of Naylor, Missouri, whereby he was to receive that sum for all the lumber he had so placed as soon as same could be loaded on the cars. Respondent testified that he ordered two cars on the 12th day of June, 1920, but that he did not receive them until August 19th, 1920, and when he asked for an explanation as to the delay in delivery he was shown a telegram, by the agent at Oxly, purporting to be from C. H. Dicus, Assistant Chief Dispatcher of the Missouri Pacific at Poplar Bluff, Missouri, which said telegram contained in substance, "Let Rash have cars in preference to any one else."

The testimony showed that between the dates of June 12th and August 19th, there was a drop in the market, and after August 19th, there was no demand whatever for lumber, and respondent could not sell what he had left on the market at any price, but did sell to the farmers around Oxly for from $12.50 to $20.00 per M. Respondent was unable to say exactly how much of this lumber was sold to the

farmers, but the testimony did show that about 11,000 feet out of the 31,000 feet was sold to Arnold, leaving 20,000 feet which he was unable to ship. The testimony as to the market value of lumber on June 12th, 1920, showed that it was worth $60.00 per M, as against $20.00 to $25.00 in August, 1920.

There was ample testimony on the part of the respondent tending to show that between the dates of June 12th, and August 19th, 1920, the Rash Lumber Company was loading and shipping lumber from Oxly, Missouri, at the rate of ten to fifteen cars per week.

The order book opposite page 17 in the abstract of the record discloses that respondent ordered two cars June 12, 1920, and one July 6, 1920; that the first cars he received was on August 19th, 1920. The order book also discloses that A. M. Rash ordered five cars July 13, 1920, and that the orders were filled as follows: Three, July 22; one, July 28, and one, August 3. The record further shows that Rash made an order for ten cars July 17, 1920, and eight of these were delivered prior to August 19th, the date respondent received his, and that there were other shippers whose orders were filled before that of respondent, although their applications were made after respondent's.

The testimony of the appellant shows that respondent ordered two cars June 12, 1920, and were delivered to respondent the 22nd day of July, 1920, who, unable to get loaders, agreed that Rash might load these cars, which he did. This is denied by respondent, who is corroborated by the record in the order book, opposite page 17, abstract of record, which not only fails to disclose that any cars were

delivered to respondent on that date, but shows that they were delivered to Rash.

The evidence further shows that there was an order of the Interstate Commerce Commission requiring cars to go to the coal mining districts, and a preference was given to shipments of mining props, but upon cross examination it was shown that the bulk of the Rash Company's shipments were lumber and ties.

POINTS AND AUTHORITIES.

I.

Appellant's instruction in the nature of a demurrer offered at the close of all testimony was properly overruled. There was sufficient evidence on this part of the plaintiff to show unlawful and unreasonable discrimination.

Appellant's Abstract, pages 9-10-11-12 and opposite page 17.

Nichols v. Oregon Short Line Ry. Co., 66 Pac. 768.

II.

(a). The court did not err in giving to the jury plaintiff's instruction, No. 1. It is not necessary to require the jury to find that the cars furnished the other shippers were to be used for intrastate shipments, as defendant was guilty of unlawful discrimination, regardless of how these other cars were to be used. All the respondent is concerned with is to establish the fact that his shipment was intrastate.

Puritan Coal Mining Co. v. Penn. R. R. Co., 85 Atlantic Rep. 426.

Stroud v. Missouri Pacific Ry. Co., 236 S. W. 891.

Missouri Pacific Ry. Co. v. Larabee Mills, 211 U. S. 612 Loc. Cit., 624.

(b). Appellant complains that respondent's instruction No. 1, is in conflict with appellant's No. 4, and "that it permitted the jury to find for respondent even though they believed that he was furnished cars on July 22, 1920." Instruction No. 1,

requires the jury to find "that after the said cars were ordered by plaintiff, and his application for same was filed and before said cars were delivered other shippers at the said station of Oxly, Mo., engaged in the business of shipping lumber over defendants' railroad, ordered cars from defendants' agent at the station aforesaid, and that defendant delivered cars to these shippers in preference to plaintiff and that these cars delivered to these other shippers were not to be used for shipping mine props or other mine material that had a preference under the Interstate Commerce Rulings * * *".

This instruction, we think, covers the case fully and requires the jury to find there was a preference, and it makes no difference if plaintiff had received a dozen cars, provided he showed that the railroad company discriminated against him and he sustained damages thereby.

Stroud v. Missouri Pacific R. R. Co., 236 S. W., 891 Loc. Cit. 894.

Section 9985 R. S. 1919.

(c). Instruction No. 1, does require the jury to find there was undue and unlawful preference. It sets out a state of facts, which, under the law, constitutes undue and unreasonable preference and this being true, it is unnecessary to use the terms, "undue" and "unreasonable".

Appellant's Abstract, page 63.

III.

The court did not err in giving plaintiff's instruction on the measure of damages. This instruction required the jury to "take into consideration the reasonable market value of plaintiff's lumber at the date the cars ordered by plaintiff, on the 12th

day of June, 1920, should have been delivered by the defendant, allowing defendant a reasonable time in which to make the delivery, and the reasonable market value of the lumber at the time defendant did deliver the cars." * * *

There could not have been any inference drawn from this instruction, by the jury, that would be prejudicial to defendant as it limited the amount of damages to the loss sustained on the lumber that was still at Oxly, Missouri, on August 19, 1920.

IV.

The court did not err in refusing appellant a new trial because the verdict is supported by the evidence. Appellant loses sight of the fact that the lumber, loaded and shipped on August 19th, was car material and was not included in this controversy, and the car in which it was shipped was ordered July 12, 1920. The other car referred to by appellant and shipped on the 23rd of August, 1920, and for which respondent received $60.00 per thousand, was the car upon which Arnold had advanced $600 and which he was compelled to take, and which was taken out of the original amount. This car contained about 11,000 feet which left 20,000 or 21,000 feet, upon which the loss was sustained.

Appellant's Abstract, page 17.

ARGUMENT.

The testimony in this case shows that respondent, the Rash Lumber Company, and others, were engaged in shipping lumber to various points, both within and without the state of Missouri, and were shipping over appellant's railroad. On June 12, 1920, respondent made application for two cars in which to ship a quantity of his lumber, which he had placed and ready for shipment, and these cars were not delivered until August 19, 1920. Between these dates, several other shippers ordered cars and their cars were delivered by appellant before those ordered by respondent were delivered. Appellant's own record shows that Park Brothers ordered cars, June 28, 1920, for the purpose of shipping chair posts and that this car was delivered August 15, 1920. The Rash Lumber Company ordered five cars for lumber and ties, July 13, 1920, and they were delivered to them on July 22-28, and August 3, 1920. There were several other orders that were filed after that of respondent and which were filled before he received the cars ordered by him. This clearly shows unlawful discrimination against plaintiff. (Nichols v. Oregon Short-Line R. R. 66 Pac. 768.)

Appellant attempted to prove that the cars ordered by respondent, June 12, 1920, were delivered to him, July 22, 1920, and that through some arrangement between this respondent and the Rash Lumber Company, the cars were turned over to the Rash Lumber Company, however, appellant's own record refutes any such argument, for it discloses that these cars were not delivered to the respondent until August 19, 1920, and respondent testi-

fied to the same state of facts. As this question was one of fact, and was passed upon by the jury, we believe that the court will be justified in accepting the jury's finding as conclusive.

Appellant contends that the verdict of the jury was not supported by the evidence because he says, "the loss could not have been more than $400, under the most favorable circumstances" but in arriving at this conclusion, appellant is taking into consideration, a carload of car material, which was shipped on August 19, 1920. This car material never was included in the subject matter of this lawsuit. There was approximately 31,000 feet of inch lumber stacked at Oxly, and none of it was shipped until August 23, and then only 11,000 feet. This was a carload that Arnold had purchased and advanced the money on and it was never included in the 20,000 feet upon which plaintiff's loss was sustained.

The evidence shows that plaintiff's lumber was worth $60.00 per thousand, at the time the cars were ordered, and when the cars were delivered, there was no sale at all, although plaintiff sold the lumber to local people at various prices, ranging from $8.00 to $20.00 per thousand. Plaintiff testified that he sold 1,000 feet at $20.00 per thousand, 2,000 feet at $12.50 per thousand, 7,000 feet at $10.00 per thousand, 6,000 feet for $8,00 and the remaining 4,000 feet, which he testified was worth $8.00 per thousand, was taken home and used. The total amount received was $195.00, which if subtracted from $1,200 the value on the 12th of June, 1920, leaves $1,005.

Upon the former trial of this case, appellant took the position that since there were two lines of railroad, from Oxly, Missouri, to St. Louis, Missouri, one running through Illinois, and over which plain-

tiff's lumber might have been shipped, had he received the cars he ordered, that the trial court had no jurisdiction of the case, however, this court refused to entertain the proposition, and now appellant takes the position that if some of the other shippers were shipping over a line of railroad running through Illinois or some other State, that this fact would preclude plaintiff from recovering in the State Court. It seems to us that one of these contentions is just about as logical as the other, and we have no doubt that this last position, with reference to interstate shipments, will meet the same fate as did the former.

We believe, that the facts in this case are in the plaintiff's favor and two juries that have passed on them evidently believed the same thing. We also believe that the law, as given in behalf of respondent, was proper and that the case was fairly tried, and we earnestly believe that the judgment of the trial court should be affirmed.

Respectfully submitted,
COPE and TEDRICK, of Poplar Bluff, Mo., and GEO. H. MOORE, of St. Louis, Mo.,
Attorneys for Respondent.

In The

Springfield Court of Appeals

MARCH TERM, 1923.

POPLAR BLUFF CALL.

ROY STROUD, ... **Respondent**

vs.

MISSOURI PACIFIC RAILROAD COMPANY, a Corporation ..... **Appellant.**

Respondent's Brief and Argument

On Appellant's Motion for Rehearing.

COPE & TEDRICK,
Attorneys for Respondent.

POINTS AND AUTHORITIES.

I.

Respondent's instruction No. 1 was properly given. It is not necessary to require the jury to find "that the cars furnished the other shippers were not to be used in interstate commerce." All that respondent is concerned with is in establishing the fact that his shipment or rather intended shipment was intrastate.

Puritant Coal Mining Co. v. Penn. R. R. Co., 237 Pa. St. 420. Affirmed in 237 U. S. 121.

Missouri Pacific Ry. Co. v. Larabee Mills, 211 U. S. 612.

Public Utilities Commission ex rel Hillsboro

Coal Co. v. Cleveland C. C. & St. L. Ry. Co., 301 Ill. 219.

Mulberry Hill Coal Co. v. Illinois Central R. R. Co., 257 Ill. 80. Affirmed in 238 U. S. 275.

Chicago Milwaukee & St. Paul Ry. Co. v. State Public Utilities Company of Illinois, 268 Ill. 49. Affirmed in 242 U. S. 333.

Pennsylvania R. R. v. Sonman Coal Co., 241 Pa. St. 487. Affirmed in 242 U. S. 120.

State of Texas v. East Texas Ry. Co. Advance opinion. Lawyer's Co-operative Pub. Co. of April 15th, 1922, page 313.

II.

The verdict is not excessive and is amply supported by the evidence. Appellants abstract of the record pages 9, 10, 11, 12 and opposite page 17.

ARGUMENT.

The first question raised by appellant on its motion for a rehearing, is "if an interstate shipper is favored over an intrastate shipper, has the latter any remedy under the state statute?"

In view of the authorities cited by respondent, we contend that he has. In the absence of legislation by Congress against discrimination between interstate shippers, the state had the right to legislate against discrimination against both interstate and intrastate shippers. Congress having legislated against discrimination between interstate shippers, appellant contends that it has taken over the whole subject matter of discrimination between both interstate and intrastate shippers, which contention well illustrates the tendency of the railroads of the country to attempt to centralize all the power in the Federal Government.

The Interstate Commerce Act does in its terms, provide a remedy for an interstate shipper where he has been discriminated against but it has no provisions giving an intrastate shipper such a remedy where he has been discriminated against, in favor of, either an intrastate or interstate shipper and in view of that fact, we contend that the state is left free to legislate on that subject.

In Mulberry Hill Coal Co. v. Illinois Central R. R. Co., 257 Ill. loc. cit. 82, the Court, in defining the powers of Congress over Interstate Commerce said, "Congress has exclusive jurisdiction over inter-state commerce but we do not understand that a railroad corporation created by a state may, by engaging in interstate commerce emancipate itself from all control by the state and that thereafter the state grant-

ing the franchise and endowing the corporation with all its powers will have no authority to require the performance of the undoubted duty of carrying property offered for transportation where the requirement does not impose any burden upon interstate commerce, or disable the corporation in any way from carrying on such commerce."

It seems to us that this court has ample ground to maintain its opinion as heretofore delivered in this case, and we do not believe that our State Courts will supinely surrender the rights of the state, under the circumstances disclosed herein until there has been an authority holding to the contrary by the highest Federal Court, and we respectfully submit that none has been cited by appellant.

Appellant contends that the verdict was excessive and that respondent was entitled to only $400.00 damages, if any at all but as we review the testimony of the plaintiff we are convinced that there is ample testimony to sustain the verdict. Respondent testified that he had between 31,000 and 32,000 feet of one and two inch lumber which he had contracted to sell at $60 per thousand. In fact he had already received $600 on this lumber, which advancement accounts for the fact that the buyer, Add L. Arnold, of Naylor, Mo., took one car, although at a loss. After this car was sold to Arnold, on the 23rd of August, 1920, there remained 20,000 feet which respondent sold at prices ranging from $8 to $20 per thousand. The two cars described in plaintiff's petition were delivered on Aug. 19, 1920, and, of course these cars could have been loaded with the lumber, but appellant loses sight of the fact that there was no market for that class of lumber on that date and instead of complaining that respondent

sold one carload of the lumber at $60.00 per thousand appellant should feel grateful that it was not called upon to pay the damages on that car.

The fact remains that if the two cars ordered June 12, 1920, had been delivered within a reasonable time this 20,000 feet of lumber could have been disposed of at $60.00 per thousand instead of the prices heretofore mentioned and instead of losing $1005.00 respondent would have sustained no loss at all. (See Appellant's Abstract of the Record pages 9-10-11-12 and Respondent's Brief pages 12-13.)

There is some testimony concerning shipments of car material but as respondent is not asking for damages sustained on these shipments, they should not be considered. (See Appellant's Abstract of the Record pages 16-17.)

We respectfully insist that there is sufficient evidence to support the verdict and confidently expect this Court to maintain its opinion as heretofore rendered.

Respectfully submitted,

COPE & TEDRICK, of Poplar Bluff, M.,
and GEO. H. MOORE of St. Louis, Mo.,
Attorneys for Respondent.